NO. 48713-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WALLACE PRUITT, III, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chuscoff

No. 15-1-01419-8

BRIEF OF RESPONDENT

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to run his firearm enhancement consecutive to his longest concurrent base offense sentence.

C. ISSUES PERTAINING TO RESPONDENT'S ASSIGNMENT OF ERROR.

1. Is correction of defendant's illegal sentence a "necessity of the case" under RAP 2.4(a), obviating the need for the State to file a notice of appeal, since our Supreme Court has held a court cannot allow a sentence to stand where it exceeds the authority vested in the trial court by the Legislature?

2. Must the case be remanded for correction of sentence since the current sentence violates RCW 9.94A.533(3) because it fails to run his 72 month firearm enhancement for the assault conviction consecutive to the longest concurrent sentence of 116 months for his UPOF convictions?

D. STATEMENT OF THE CASE.

1. Procedure

Defendant was arraigned for assaulting his girlfriend, Carol Spearance,[1] on April 13, 2015. CP 1. An order prohibiting his contact with her was entered in his presence at that time.[2] Ex.42. He proceeded to trial

[1] Victim changed her surname from Curry to Spearance shortly after the assault. 3RP 110.
[2] No transcript for the arraignment was adduced by defendant. *See* RAP 9.1(b).

charged with firearm enhanced second degree assault, 2 counts of unlawful firearm possession, 3 counts of witness tampering and 9 counts of violating the protection order. CP 8-16. Domestic violence enhancements were added to all but the firearm counts. *Id.*

The Honorable Bryan E. Chushcoff presided at trial. Defendant's guilt was proved through 6 witness over 6 days, during which 67 admitted exhibits were admitted. CP55-59; 207.[3] The evidence included a bullet he fired at the victim before she frantically sought help from family and police, 9 recordings of his prohibited conversations with her and the order making them illegal. Ex. 1A, 42, 58-78. A properly instructed jury found him guilty as charged. CP 60, 146. A 120 month sentence was erroneously imposed, as his 72 month firearm enhancement is running concurrent to the sentence imposed on his other current offenses. CP 147-48.

2. Facts

Defendant had been in a romantic relationship with Spearance for about a year by April 11, 2015. 3RP 118. They were living together. *Id.* But on that day, Spearance arranged to bring her friend Tammie Schager into the relationship through a sexual encounter they called a "threesome." 3RP 119. Schager arrived at Spearance's residence that evening. 3RP 119-120.

[3] CP above 206 estimate supplemental designations.

They drank some wine before going to a bar with defendant. 3RP 123. The three of them returned to the house around 11:00 p.m. for the threesome, which lasted about two hours. 3RP 124-25, 5RP 471. Schager left. 3RP 126. An argument between Spearance and defendant ensued. 3RP 126-127.

The argument got physical when defendant caused her to blackout through a series of strangulations amid a protracted assault; wherein, he forced his .45 caliber pistol in her mouth, then her vagina. 5RP 469-470; 6RP 600, 637. At one point he slammed her on the ground where he stepped on her jaw. 3RP 132, 4RP 288, 5RP 392-393, 423-424, 469. Spearance fled in her car. 3RP 129; 6RP 638. Defendant tried to stop her by firing a gun toward the car. 5RP 469-72; 6RP 563-64, 567. The bullet splintered window shutters on the house across the street, before shattering a window as it traveled into the home where it hit a china cabinet. *Id.* A bullet fragment was recovered from the living room floor. *Id.*; Ex. 59-77.

The shot sent Spearance into a panic still affecting her 45 minutes to 1 hour later when she called her teenage daughter, Jessica, between 2:00 a.m. and 4:00 a.m. 3RP 131-34.[4] Spearance was "hysterical," "crying;" "hard to understand []." 5RP 392. Jessica thought Spearance said defendant shot her in the vagina, stepped on her jaw, she was bleeding. 5RP 393, 403.

[4] Jessica Curry and Anthony Curry will be referred to by first names to avoid confusion. No disrespect is intended.

Jessica was crying when she gave the phone to her father, Spearance's ex-husband, Anthony. 5RP 422-26. Spearance was "hysterical[ly]" "scared" in a way he never experienced over their 20 years of marriage; she is an engineer who was a firefighter when they met. 3RP 111-12; 5RP 422-26. He compared her behavior to a "horror movie." 5RP 423. Unlike Jessica, he heard the assault as a sequence that did not include a shot to the vagina:

> [S]he said, he choked me. He slammed me on the ground. He stuck a gun in my vagina. He shot at me.

5RP 424. Amid her "hysterical" explanation, he heard her say she was shot. 5RP 424. He was "freaked out" by how "extremely scared" she sounded. 5RP 423-24. He called 911 on another phone. 5RP 424-25. She did not calm down during their 5 minute conversation. 5RP 425-26.

Police were dispatched around 4:00 a.m. 5RP 468. Officers found Spearance "near hysterical, crying," in her parked car. 5RP 469; 6RP 598. She was not intoxicated. 5RP 498; 6RP 645. Hysteria left her "unable to answer questions[]." 5PR 469; 6RP 598-99. She eventually articulated:

> [H]er boyfriend [] placed a pistol into her mouth and then into her vagina. As she left the residence, he [] fired a shot at her vehicle.

5RP 469-70, 477-781; 6RP 601. She said he strangled her to the point of unconsciousness several times. 6RP 601. She had pain in her face and jaw. 5RP 470; 6RP 600. She had pain in her neck, which was red. 6RP 600. She

was hurting from the "pistol [defendant] shoved up her vagina." 6RP 600, 638. It was said to be a .45 caliber. 6RP 600. She never claimed to be shot in the vagina. 6RP 634. She remained "very upset." 6RP 601. Medical aid was called. 5RP 470, 479. Defendant arrived at their location. 5RP 470-71; 6RP 602. Spearance warned he would kill them, or words to that effect. 6RP 629. He admitted trying to prevent her from leaving after an argument and acknowledged there were two firearms in their home. 5RP 471-73, 481-82.

Spearance was still crying as well as exhibiting difficulty speaking when police contacted her in the hospital at 5:13 a.m. 6RP 615, 633. The strangulation was described as defendant wrapping his right arm around her neck while using his left arm to pull the right arm tight. 5RP 618. Through this method he caused her to pass out multiple times. 6RP 618, 637-38. Being choked affected her voice, gave her a head ache as well caused her vision to blur "with a rainbow hue." 6RP 618. She was still distressed when police left the hospital. 6RP 618.

Police recovered an operable shotgun from the master bedroom closet of the house defendant shared with Spearance. 6RP 516-17, 519, 607. A box of 45 caliber cartridges was found in the bedroom. 6RP 612, 614. At trial, the prior serious offense making it unlawful for defendant to possess firearms was proved. 7RP 770-71; CP 83 (Inst.21); Ex.84. A neighbor living across the street learned her window had been shot out sometime between

4:00 p.m. April 11, 2015, and around noon April 12, 2015. 6RP 562-64, 568; Ex.29, 31. Shattered glass comingled with debris from the blown out shutters littered her house. 6RP 563, 579; Ex.67-75.[5] There was a strike mark on her china cabinet. 6RP 567; Ex. 74-78. A bullet fragment was found on her living room floor. 6RP 563-64, 572-73, 579, 587-88; Ex.44.

Anthony received a series of texts from Spearance within 24 hours of the first call, admitted to impeach her recantation at trial. 3RP 185-86; 5RP 322-26, 388, 438; 6RP 512-13; CP 69 (Inst.7). They documented her describing marks on her neck, a "messed up" jaw as well as a "vagina [] messed up from the gun." 5RP 439; Ex.53. They differentiated defendant's use of the gun to penetrate her from his later act of shooting it in her direction. 5RP 439-40. They reiterated her initial report of him forcing the gun in her mouth and "choking her out about four or five times." 5RP 440. Anthony saw her injuries several days later. 5RP 440-41. Her neck was visibly marked by bruising, scratches or the like. 5RP 441. She said it was "really messed up." 5RP 441. She expressed her vagina and jaw still hurt. 5RP 441. Jessica observed Spearance's jaw to be "bruised" with a "reddish-purple" hue, and that she was in pain. 5RP 395, 401.

[5] Debris had been removed by the time the police photographs were taken. 6RP 570, 581.

A court order prohibiting defendant from contacting Spearance was entered at 3:26 p.m., April 13, 2015, in open court with defendant present. 3RP 164; Ex.42. At trial, he was described as "[e]xtremely intelligent" with "a good knowledge of the law." 4RP 220. Spearance was also present when the order was entered and knew it prohibited him from talking to her about the case. 3RP 163, 218. Still, they were recorded in a series of conversations after the order was entered. Ex.1(a); 3RP 163, 172-73. At trial, she claimed memory problems while recanting her initial account of defendant's crimes, which is precisely what he instructed her to do. 3RP 131-33, 174-75; 4RP 204-06; 8RP 828; Ex.1(a) (Apr. 13, 2015; 5:04 p.m., 6:56 p.m.; 7:21 p.m.) She still wanted to be with him. 4RP 220-21.

C. ARGUMENT.

1. THE VICTIM'S PANICKED DESCRIPTION OF HOW DEFENDANT ASSAULTED HER BEFORE FIRING A GUN TO PREVENT HER ESCAPE WAS PROPERLY ADMITTED UNDER ER 803(a)(2) SINCE IT WAS GIVEN UNDER THE STRESS OF THAT TERRIFYING EVENT.

ER 803(a)(2) provides for the admissibility of hearsay statements relating to a startling event made while the declarant was under the stress of the same. ***State v. Thomas***, 150 Wn.2d 821, 853-55, 83 P.3d 970 (2004). Neither the passage of time, discrepancies, nor recantation are dispositive on the issue of admissibility. *See Id.*; ***State v. Young***, 160 Wn.2d 799, 807-

09, 820, 161 P.3d 967 (2007). For a statement may nonetheless be a reliably spontaneous reaction to stress. *Id.* Evidentiary rulings will not be disturbed unless manifestly unreasonable. *Id.* And credibility calls are not reviewed. ***State v. Cross***, 156 Wn.App. 568, 580, 234 P.3d 288 (2010).

Defendant moved to exclude the statements Spearance made to her family the night of the incident, claiming they did not qualify as excited utterances. 2RP 64. Her recantation of them was presented in a declaration. 2RP 62-65, 65-68, 69-70; CP 35. The court was aware of defendant's efforts to influence her testimony. 2RP 64-65, 68-69; Ex.1(a) (4/13/15; 5:04 p.m); (4/13/15; 6:56 p.m.); (4/13/15; 7:21 p.m.); 3RP 174-75. It ruled:

> With respect to excluding Ms. [Spearance's] statements at the scene or near the scene, I don't have a basis now to exclude them or not to exclude them. If they are hearsay, they are not admissible. If they are an exception to the hearsay rule because of they're a statement of identification or that they are a statement of present sense impression or an excited utterance, then they might be admissible. I have to figure that out as we go.
>
> I'm denying it as a motion in limine. I think [defense counsel] himself said that he may have to do this on a case-by-case basis, and I think that is correct. We will resolve those issues as we go along here.

2RP 72-73.

The court had the opportunity to assess the credibility of Spearance's claims of forgetfulness and fabrication, which mimicked instructions she received from defendant. In one call they talked about cleaning a pistol,

referred to as a ".45." 215-16 (4/14/15; 1:27 p.m.). At trial, she said the .45 was sold before the incident, which was at odds with her recorded reference to it and the box of .45 caliber ammunition recovered from her bedroom. 3RP 155; 4RP 276-78; 6RP 611-12.

She acknowledged being "upset" on the night of the incident. 3RP 126-27. She admitted an argument with defendant prompted her to drive away as well as the fact she was "crying," in "a complete frenzy" during conversation defendant claims was not an excited utterance. 3RP 128-32. She confirmed defendant tried to prevent her from leaving. 3RP 131; 4RP 265-67. She claimed to be intoxicated from drinking too much "Fireball;" a beverage she denied drinking in a recorded call. She accounted for the discrepancy by explaining defendant helped her "to realize" the truth about drinking it. 4RP 220. Her challenged statements as well as her injuries, which at trial she attributed to falling around the house, were then blamed on intoxication. 3RP 125-26, 128-34; 4RP 129-30, 220, 230.

When confronted with her description of the assault to her daughter, Spearance said: "I guess I had told her some things that weren't true," referring to her explanation of the attack as "some silly rhetoric." 3RP 132 (emphasis added). It was for the trial court to decide if her demeanor while testifying combined with her use of "I guess" to qualify her recantation betrayed it to be a fabrication. An inference of fabrication reinforced when

she trivialized the protracted, sadistic, and potentially lethal attack she frantically described to her teenage daughter, ex-husband and two police officers in the middle of the night as "some silly rhetoric." 3RP 134, 137; 4RP 129-30, 229-30, 288. She went on to describe most of her injuries as self-inflicted. 3RP 137. As for being chocked, she claimed it was part of consensual sex. In a recorded conversation with defendant, she described lacerations on her vagina, then recanted the truth of that statement at trial. 4RP 208-09; 1(a)(4/13/15; 5:21PM). She ended up in an emergency room where a "rape kit" examination was performed and recalled her sister crying over her in the hospital room. 3RP 134-35.

Despite those vivid memories, on direct examination she denied any recollection of describing defendant's attack to police or Anthony. 3RP 136-37. Yet her memory *miraculously* returned when led through those topics during defendant's cross-examination. 4RP 288, 289-90, 295-96. In a recorded call, she assured defendant: "not to worry about it. It is going to be fixed." 4RP 222; Ex.1(a)(4/14/15; 2:39 p.m.). She said that she was only testifying to comply with a subpoena, which contradicted her claim of being there to clear defendant's name through the "magic" of truth. 4RP 223, 304.

Admissibly of the excited utterances was next taken up through voir dire of Spearance's ex-husband Anthony. 3RP 110-88; 4RP 192-313; 5RP 348, 357. He recounted her statements about the incident while stressing

she was "absolutely hysterical." 5RP 349, 375-85. Amid the hysteria, he understood her to say defendant:

> slammed [her] on the ground a number of times, strangled. [] She was shot as well as shot at when [] leaving. [] She was scared. She was fearful of me calling 911. [] She also said that he put a gun in her vagina.

5RP 349-50. The call came 45 minutes to 1 hour after the incident, which the court did not find long enough to disqualify the statement from ER 802(a)(2) based on ***State v. Guizzotti***, 60 Wn.App. 289, 803 P.2d 808 (1991) (7 ½ hours), ***State v. Fleming***, 27 Wn.App. 952, 621 P.2d 779 (1980) (6 hours). 3RP 131, 133-34; 4RP 269-70; 5RP 384-88. But the court made clear it needed more evidence to rule. 5RP 386-87.

More evidence was adduced through Spearance's teenage daughter Jessica. 5RP 389. Jessica stressed her mother "sounded hysterical," "loud," was "crying" and "hard to understand." 5RP 392-393. Amid that hysteria, Jessica heard her mother say defendant "shot her in the vagina and stepped on her jaw and she was bleeding," "she was in pain and [] just hurting." 5RP 393, 401. Spearance was "still upset" when the call ended. 5RP 394.

Antony testified. 5RP 419. He had been Spearance's husband for 20 years. 5RP 419. They met in the Army. 5RP 419. Spearance's served as a firefighter before becoming an engineer. 3RP 111-12. Anthony reiterated his voir dire testimony, again stressing she was "crying" "pretty loud"

"hysterical, very scared." "extremely scared." 5RP 421-23. He explained the characterization:

> Just the tone of her voice. I have known her for 20 years. I have never heard her sound like that before. [] It was loud. It was very vocal, very – it was something out of, let's say, a horror moving. She was really, really scared.

5RP 423. The court overruled defendant's objection, permitting Anthony to recite her statements:

> [Defendant] chocked [her]. He slammed me on the ground. He stuck a gun in my vagina. He shot at me. She said that she had been shot. That's way she said.

5RP 423-24. "[F]reaked out," "worried," wanting to help, Anthony called 911. 5RP 424. When asked if she calmed in their 5 minute conversation, he said: "No, not at all. Not once." 5RP 425-26. The responding officers were next to encounter Spearance. 5RP 469. Officer Maahs found her:

> Inside [a] vehicle [] near hysterical, crying. [] [U]nable to answer questions at first when [] first contacted[.]

5RP 469-70. Unlike Jessica and Anthony, who heard Spearance describe being shot, Officer Maahs heard her say:

> [H]er boyfriend placed a pistol into her mouth and then into her vagina. As she left the residence, he [] fired a shot at her vehicle. [] [S]he complained of pain in her jaw[.]

5RP 469-70. There was no objection to this testimony. *Id.* Officer Miller provided a similar account, also without objection:

> She was hysterically crying and could barely tell us what was going on. She kept bending over into the steering wheel and wasn't really responding to the questions we were asking.[]

6RP 598. When asked if an interview was conducted, Miller replied: "As much as we could. She was pretty hysterical and hard to get information out of." 6RP 599. Miller discerned Spearance's neck hurt from being strangled to the point of losing consciousness a couple of times; her neck was red. 6RP 600-01. Her "vagina hurt" as "a pistol [was] shoved up her vagina[;] her black Smith and Wesson, .45 caliber[.]" 6RP 600. All of which was perpetrated by defendant. 6RP 600. Spearance also said:

> [S]he was trying to leave the house and she ran to the garage to get in her car, and her boyfriend had followed her to the garage and entered through the pedestrian garage door as she was in her car and fired a gun towards her in the car.

6RP 601. She was "still very upset" while relaying this information. 5RP 601-02. Yet she did not claim to be shot. *Id.* Independent proof of the bullet defendant fired was admitted through witnesses to bullet damage across the street. 6RP 562-64, 568-79, 587-88; Ex.29, 31, 44. Spearance remained distressed at the hospital. 6RP 606, 615. She would not release the medical record of her injuries because she was afraid of defendant. 6RP 646. There was no change in her demeanor throughout the contact. 6RP 618.

a. It was not unreasonable for the judge to conclude Spearance remained under the stress of a startling event when the challenged statements were made.

The passage of time is not dispositive in the assessment of whether a statement following a startling event is admissible as an excited utterance. ER 802(a)(2). ***Thomas***, 150 Wn.2d at 854-55. Persistence of an event's stressful affect is key. ***Young***, 160 Wn.2d at 813; ***State v. Strauss***, 119 Wn.2d 401, 416, 832 P.2d 78 (1992); ***State v. Chapin***, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). People under the stress of excitement are reliably presumed less capable of fabrication. *Id.*; ***Guizzotti***, 60 Wn.App. at 295; ***State v. Briscoeray***, 95 Wn.App. 167, 173-74, 974 P.2d 912 (1999).

Trial courts are relied upon to assess the circumstances attending a statement for the presence of stress-induced reliability. ***State v. Williamson***, 100 Wn.App. 248, 258, 996 P.2d 1097 (2000); ***Briscoeray***, 95 Wn.App. at 173-74. Admissibility is a matter of emotional state, usually proved through indirect evidence of behavior or a statement's context. *Id.*; ***Young***, 160 Wn.2d at 812-13. Once a declarant is found to be sufficiently influenced by a stressful event for her statements to be excited utterances, the decision will not be disturbed unless no reasonable judge would agree. ***Briscoeray***, 95 Wn.App. at 175. The credibility of facts adduced to prove excitement is not reviewable. *Id.* at 173.

The court correctly decided Spearance was under the stress of events that transpired at her house when the challenged remarks to her daughter and ex-husband were made. Only 45 minutes to 1 hour elapsed from the startling event to her call. 3RP 131, 133-34; 4RP 269-70; 5RP 385-86. She was admittedly "freaking out," "crying," in "a complete frenzy." 3RP 129. Everyone who subsequently contacted her described her as "loud," "crying," "hysterical" and "hard to understand." 5RP 392-393, 421-22, 469-70; 6RP 598. Her former husband of 20 years felt most comfortable comparing her behavior to "a horror movie;" it was behavior he never experienced during their relationship. 3RP 111-125; RP 421-23. And it was an elevated state she maintained for hours after the call in which the challenged statements were made. 6RP 606, 615.

Defendant's argument seems to be that statements made 45 minutes to 1 hour after a startling event exceed some time limit contemplated by ER 803(a)(2). App.Br.10. But precedent does not support that position. Elapses of time far greater than 45 minutes to 1 hour have not disqualified remarks from admissibility under that rule. *E.g.*, ***Thomas***, 150 Wn.2d at 855 (1 ½ hour); ***Guizzotti***, 60 Wn.App. at 295 (7 ½ hours); ***State v. Flett***, 40 Wn.App. 277, 287, 699 P.2d 774 (1985)(7 hours); ***Fleming***, 26 Wn.App.at 953 (3-6 hours); ***State v. Sunde,*** 98 Wn.App. 515, 520, 985 P.2d 413 (1999)(2 hours). And most of those declarants exhibited demeanor comparable, if not

markedly less hysterical, than Spearance manifested. *E.g.*, ***Thomas***, 150 Wn.2d at 855 ("scared"); ***Strauss***, 119 Wn.2d at 416 ("distraught"); ***Briscoeray,*** 95 Wn.App. at 173-74 ("crying and upset"); ***Williamson***, 100 Wn.App. at 258 ("highly emotional"); ***Sunde***, 98 Wn.App. at 520; ***Fleming***, 27 Wn.App. at 956 ("crying, sobbing and upset"). The trial court reasonably concluded Spearance's statements were the product of a startling event.

b. Spearance's frantic description of the assault was not proved to be a fabrication by the presence of the claimed discrepancies or her coached recantation.

i. Evidence she franticly claimed to be shot is most likely attributable to misunderstanding or hysteria.

"There is no authority to support the proposition [] the proponent of excited utterance evidence must prove the exact content of [the] utterance for [it] to be admissible." ***Young***, 160 Wn.2d at 820. The trier of fact is to weigh conflicting remarks for credibility. *Id.* It is not an abuse of discretion to admit similar statements about a startling event as excited utterances despite discrepancies, which affect the weight a jury should assign to them but not their admissibility. *Id.*

Defendant wrongly claims the trial court abused its discretion in admitting the challenged statements because Spearance allegedly "had time and opportunity to fabricate, and in fact did fabricate a portion of her story."

App.Br. 10. His evidence of fabrication is the fact Jessica and Anthony heard Spearance claim to be shot when there is no evidence of a wound. But it was for the trial court to weigh the credibility of the excited utterance in context—a context that included her uncontroverted hysteria while describing the assaults, both hearer's emotional response to the information, corroborating injuries, corroborating-bullet damage, the presence of a pistol in the home, defendant's admitted interference with her departure as well as his proven influence over her testimony.

Because rules of evidence do not apply to questions of admissibility, the court was free to consider the credibility of Spearance's jail-call remarks about sustaining vaginal lacerations, and other statements about vaginal pain when evaluating whether her excited utterance about the source of that injury was misunderstood. ER104; 4RP 208-09; 1(a)(4/13/15; 5:21 p.m.). Most critical are the circumstances under which the statement about being shot was heard. Jessica and Anthony described her as hysterical, crying, loud; all of which detract from intelligibility. Only sixteen year old Jessica heard her mother describe being shot in the vagina. 5RP 393, 424. Anthony heard Spearance describe being shot more generally. *Id.* But the police who contacted her moments later understood a bullet was fired toward her, not in her, and that the forced-vaginal penetration with the pistol was finished before it was fired toward her fleeing vehicle. 5RP 469-70; 6RP 601.

The court could have reasonably concluded Spearance described a series of assaults over the phone without precision of temporal detail. It is understandable how Spearance's frightened sixteen year old daughter and ex-husband may have conflated the assaults Spearance described given how unusual it would be for them to hear her refer to a gun as an instrument of vaginal penetration and for shooting during a conversation including frantic descriptions of vaginal bleeding. Evidence of a misunderstanding likely attributable to the chaotic circumstances attending a startling event is not undisputed proof of reflective fabrication.

Had Spearance actually misstated, or misapprehended, she was shot amid a moment of post-shooting hysteria, the statement is far more logically explained as shock-induced delirium or the frantic overreaction of a person who had just been unexpectedly shot at as she fled from a brutal assault. The statement, under those circumstances, certainly does not support the inference of reflection-based fabrication. It should be difficult to conceive of a reflective person aiming to falsely accuse someone of assault choosing a claim so refutable as that of sustaining a nonexistent gunshot wound. But *it is* an irrational figment one might expect from a person whose reason was swayed by the stress of a shooting. The hysterical ranting that resulted in the challenged discrepancy revealed the absence of a calm, reflective state of mind; it did not indisputably prove disqualifying fabrication.

ii. Spearance's coached recantation corroborated the credibility of her excited utterance by showcasing defendant's consciousness of guilt.

Trial courts properly assess the credibility of a recantation against the evinced reliability of statements offered as excited utterances. ***Young***, 160 Wn.2d at 808; ***State v. Magers***, 164 Wn.2d 174, 188, 189 P.3d 126 (2008). And they wisely will not "ignore the reality [] recantations may [] be fabricated, often as a result of pressure from other interested parties[.]" ***Young***, 160 Wn.2d at 808-09; ***Briscoeray***, 95 Wn.App. at 173. Even the presence of an admitted falsehood will not necessarily disqualify statements from admissibility under ER 803(a)(2), particularly when induced by fear. ***Magers***, 164 Wn.2d at 188. The remainder of the statement may still be deemed a spontaneous truth. *Id.* (excited utterance despite lie to police).

Defendant does not challenge the recordings that proved the ways he tampered with Spearance's testimony. *E.g.*, Ex.1(a)(4/13/15; 5:04 p.m.) (4/13/15; 6:56 p.m.) (4/13/15; 7:21 p.m.); 3RP 174-75. One call caught him directing her to attribute her hysteria to drinking too many "Fireball" shots, which she did at trial despite telling him she did not drink them. 4RP 220. Another call caught her reference the vaginal lacerations she denied at trial, which corroborated her initial claim about being vaginally assaulted with a gun. 4RP 208-09; Ex.1 (a) (4/13/15; 5:21 p.m.). When her heavily coached

recantation is considered against the factually uncontroverted hysteria attending the challenged remarks, there is nothing unreasonable about the court finding them sufficiently reliable to be submitted for the jury's consideration at trial. ***Young***, 160 Wn.2d at 813.

Defendant advances ***State v. Brown***, 127 Wn.2d 749, 757-58, 903 P.2d 459 (1995) to support his claim. But that case was clarified by ***Young***, which limited ***Brown***'s exclusionary rule to cases where the excited quality of a statement admitted under ER 803(a)(2) is disproved by "undisputed evidence" of reflective fabrication. ***Young,*** 160 Wn.2d at 807. In this case, the recantation was exposed to be a fabrication influenced by defendant. Exclusion of the excited utterances would have rewarded him for tampering with Spearance's testimony. The decision to admit them should be affirmed.

c. Admission of the challenged excited utterances was harmless if error, for most of the content is otherwise admissible through other rules and evidence.

Evidentiary error is harmless unless it probably prejudiced the case by materially affecting the verdict. ***State v. Barry***, 183 Wn.2d 297, 303, 352 P.3d 161, 165 (2015). Still, a defendant who fails to seek a final ruling on a motion in limine waives any objection to the admissibility of evidence it addressed. ***State v. Riker***, 123 Wn.2d 351, 369, 869 P.2d 43 (1994); ***State v. Carlson***, 61 Wn.App. 865, 875, 812 P.2d 536 (1991). Error may only be

assigned on the specific ground of an objection made at trial. ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); ER 103(a)(1). Rulings on the admissibility of evidence are affirmed on any basis supported by the record. ***State v. Swan***, 114 Wn.2d 613, 659, 790 P.2d 610 (1990).

Most of the hearsay challenged as inadmissible under ER 803(a)(2), is admissible under other evidentiary rules. The entire statement describing defendant as the person who assaulted Spearance before shooting toward her as she fled was admissible as a statement of identification under ER 801(d)(1)(iii) regardless of whether ER 803(a)(2)'s elements were met. For it was "one of identification of [defendant] made after perceiving [him]." ER 801(d)(1)(iii); ***State v. Grover***, 55 Wn.App. 252, 256-59, 777 P.2d 22 (1989) (out-of-court identification of robber). The rule covers statements identifying inanimate objects, like the firearm defendant used. *See* ***State v. Stratton***, 139 Wn.App. 511, 516, 161 P.3d 448 (2007).

Meanwhile, Spearance's description of resulting injuries, pain and fear was admissible as a present sense impression under ER 803(a)(3), for it conveyed a then-existing mental, emotional, or physical condition. ***State v. Parr***, 93 Wn.2d 95, 106-07, 606 P.2d 263 (1980); ***State v. Flett***, 40 Wn.App. 277, 287-88, 699 P.2d 774 (1985); ***People of Guam v. Ignacio***, 10 F.3d 608, 614 (9th Cir.1993) (victim's statement "her pee-pee hurt" admissible as present sense impression).

The challenged remarks Spearance made during her frantic call to her teenage daughter and ex-husband were cumulative because they were repeated in statements she made to police that were admitted at trial without objection. 5RP 469-70; 6RP 601-18. Defendant cannot rely on his motion in limine or objections made to the admissibility of Spearance's telephone conversation with Jessica and Anthony to preserve objections to the officers' testimony as the court was clear his hearsay objections would be resolved "as [they] go along " 2RP 72-73. The express purpose of the ruling was to ensure the court could assess whether foundation required for application of an asserted hearsay exception was present for each statement at issue.

There is also enough evidence of the assault to overcome any undue prejudice attending admission of the challenged statements. Conviction for the offense required the State to prove that on April 12, 2015, defendant assaulted Spearance with a firearm or by strangulation. CP 72, (Inst. 11), 73 (Inst.12), 75 (Inst.14). Her trial testimony established she drove away from her house in a frenzy after an argument with him. He admitted to interfering with her attempt to leave. Her family called 911 soon after because they awoke to a frantic call from her in the middle of the night. She was crying, and sounded extremely scared. Police found her parked along a road crying hysterically with visible injury to her neck. She was transported to the ER. Family members observed significant scratching and bruising on her neck

and reddish-purple bruising on her jaw, which is consistent with an assault that included strangulation.

Those facts combine with proof defendant used a firearm during the assault. He admitted to the presence of firearms in their home where .45 caliber ammunition was found. A bullet was fired into the front window of a house directly across the street on the night of the incident. His neighbor described the area as quiet, with the only sounds of possible gunfire coming from the vicinity of Fort Lewis. This impeached Spearance's testimony to the contrary, revealing it as an attempt to provide an alternative explanation for a bullet apparently fired by defendant. The jury was free to interpret her recantation of the strangulation and shooting as proof of their occurrence. For she equivocally framed them as events she "guess[ed]" were untrue. Jurors able to observe her demeanor could have believed the equivocation revealed her discomfort characterizing true events as false under oath. 3RP 132. *See* Interrogation and Confessions, John Reid et al., 5th Ed., p. 111-14

(2013);[6] ***State v. Barr***, 123 Wn.App. 373, 383-84, 98 P.3d 518 (2004) (Reid's credibility tests invade the jury's role).

Further support for the inference could be found in what jurors knew about her life before defendant. Before his corrosive influence transformed a veteran, mother and successful engineer into a textbook domestic violence victim willing to perjure herself to please him. A victim patently motivated by an irrational desire to remain in a violently-dysfunctional relationship that could have easily killed her on the night of the incident. All of which was substantially supported by calls in which he instructed her to discredit herself in precisely the way her equivocal recantation attempted. Recorded calls that further proved the charged offenses by exposing his consciousness of guilt for them. *E.g.*, ***Young***, 160 Wn.2d at 808-09; ***United States v. McCann***, 613 F.3d 486, 500 (5th Cir. 2010). His firearm enhanced second degree assault conviction should be affirmed.

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[6] Evaluation of Verbal Behavior. "A subject who is properly socialized and mentally healthy will experience anxiety when [s]he lies. This anxiety may result from internal conflict the suspect experiences because [s]he knows that it is wrong to lie, or from fear that h[e]r lie will be detected. Whatever the source, during an interview lies result in anxiety, and many of the behavior symptoms revealed by a deceptive subject represent h[e]r conscious, or preconscious, efforts to reduce this internal anxiety. [] When a deceptive subject is asked a direct question during an interview, [s]he has essentially four verbal response options from which to choose: deception, evasion, omission, or truth." *Id.* at 111. "Truthful subjects offer confident and definitive responses; deceptive subjects may offer qualified responses. [] Deceptive subjects may uses phrases that qualify the response, thereby weakening it." *Id.* at 114.

2. THE EVIDENCE AMPLY ESTABLISHED THAT DEFENDANT KNEW OF THE PROTECTION ORDER UNDERLYING HIS 9 CONVICTIONS FOR VIOLATING IT SINCE KNOWLEDGE CAN BE INFERRED FROM HIS PRESENCE IN THE COURTROOM WHEN IT WAS ENTERED AND DECEPTIVE ATTEMPTS TO VIOLATE IT WITH IMPUNITY.

The Domestic Violence Protection Act is intended to protect victims of domestic violence and communicate the attitude that violent behavior is not to be tolerated. ***City of Auburn v. Solis-Marcial***, 119 Wn.App. 398, 403, 79 P.3d 1174 (2003). Defendant's 9 convictions for violating the order prohibiting his contact with Spearance follow from the jury concluding he knew of the order's existence each time he violated its terms. CP 91-99 (Inst. 30-38). On appeal, defendant only challenges the proof that he "knew of the order's existence" when it was violated. App.Br. 1.

Knowledge of a no-contact order can be proved by facts establishing a defendant's awareness of its existence, such as proof of his presence in court when the order was entered. RCW 26.50.090(6); ***Solis-Marcial***, 119 Wn.App. at 402-03; ***State v. Bryant***, 89 Wn.App. 857, 871, 950 P.2d 1004 (1998); ***Griffin v. Draper***, 32 Wn.App. 611, 614, 649 P.2d 123 (1982); RCW 9A.08.010(b)(i)-(ii). Physical presence in court provides the greatest assurance that the noticed required for due process is received. *Id.*; CrR 3.4; ***State v. Irby***, 170 Wn.2d 874, 880, 246 P.3d 796 (2011); ***United States v.***

Gagnon, 470 U.S. 522, 527, 105 S.Ct. 1482 (1985). On appeal, proof a defendant received notice of a no-contact order at the time of its entry must be considered in the light most favorable to the state with all reasonable inferences capable of being drawn from it accepted as true. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Inferences are the logical consequences of proved or admitted facts. ***Dickinson v. Edwards***, 105 Wn.2d 457, 461, 716 P.2d 457 (1986); ***State v. Jackson***, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989). They are deemed to be as reliable as the facts from which they are drawn. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). It is the province of the jury to choose among competing inferences. *Id.*; ***State v. Phuong***, 174 Wn.App. 494, 534, 299 P.3d 37 (2013); ***Jackson v. Virgina***, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979)); ***United States v. Morgan***, 385 F.3d 196, 204 (2nd Cir. 2004)). So a jury's decisions pertaining to the credibility or persuasiveness of conflicting inferences cannot be reviewed. ***State v. Killingsworth***, 166 Wn.App. 283, 287, 269 P.3d 1064 (2012).

Defendant has not challenged the constitutionality of the statute that governs protection orders. But it recognizes proof of a defendant's presence in court when such an order is entered supports a sufficient inference of

knowledge to authorize enforcement. RCW 26.50.090(6),[7] .115(3);[8] ***Solis-Marcial***, 119 Wn.App. at 402-03. Proof of presence is sufficient because it provides an assurance of awareness unmatched by constructive notice, which is adequate for matters that do not entail a potential loss of liberty. *E.g.*, CR 5; ***Alverez v. Banach***, 153 Wn.2d 834, 838, 109 P.3d 402 (2005); ***Terry v. City of Tacoma***, 109 Wn.App. 448, 455-456, 36 P.2d 553 (2001).

Adequate proof of knowledge to support defendant's convictions for violating the order prohibiting his contact with Spearance was adduced through the order. Ex.42. It contained the issuing commissioner's finding he was present in open court when it was entered. *Id.* He argues the finding cannot support his convictions by characterizing it as "nothing more than a boilerplate notation." App.Br. 13. That argument does not challenge the sufficiency of the State's evidence; instead, it improperly contends the evidence should not have been perceived by the jury as credible or weighty enough to prove his guilt. The unstated premise of his argument is the electronically generated orders of modern courts must be presumed to be haphazardly entered by judicial officers without regard to their truth. Not

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[7] RCW 26.50.090(6): "If an order entered by the court recites that the respondent appeared in person before the court, the necessity for further service is waived and proof of service of that order is not necessary.

[8] RCW 26.50.115(3): "Presentation of an unexpired, certified copy of a protection order with proof of service is sufficient for a law enforcement officer to enforce the order regardless of the presence of the order in the law enforcement computer-based criminal intelligence information system.

only is this a trial argument against the evidence with no place in an appeal, it is likely fair to say our justice system would be poised to collapse if a court's pronouncement of a fact, like a defendant's presence in court, could not be reasonably accepted as true without corroborating evidence.

The notation defendant claims is too generic to be reliable proof of his presence is not the only proof of that fact in the order. There was also a finding his inability to sign the order was attributable to the "shackle[s]" he was wearing. Ex.42. This second finding reflects a present sense impression of his custodial status in court. He argues against the authenticity of notes contained in the order, claiming they were entered by "an unknown third party." Apr.Br.13. This is an improper attack on the order's credibility. A proper challenge to the sufficiency of the evidence must accept the order's authenticity as true. The argument is also frivolous. A scrivener's identity is irrelevant. Each notation became court's finding through the affixation of the issuing commissioner's signature.

Additional proof of knowledge can be inferred from circumstances attending the order. Defendant's capacity to see, hear and think was adduced through evidence of his interactions with Spearance as well as police. The order proves the court could see what defendant was wearing, so it stands to reason he could see what the court was doing. Spearance's presence in court when the order was entered led her to believe it prohibited defendant

from talking to her about the case. 3RP 163, 218. A reasonable jury could find defendant, shackled before the court, received all the information effectively imparted to a spectator in the gallery behind him. *Id.*; ER 201. His understanding of the information can also be inferred, for Spearance, an engineer, said he was "[e]xtremely intelligent" with "good knowledge of the law." 4RP 220. Defendant's misplaced attack on the persuasiveness and credibility of evidence supporting the knowledge element should fail.

Defendant also misapplies ***State v. France***, 129 Wn.App. 907, 911, 120 P.3d 654 (2005) to attack his conviction. ***France*** held harmless the erroneous admission of a *Miranda*-violative admission to knowing about an order because proof of knowledge was overwhelmingly proved by France's signature on the order admitted at trial. *Id* at 911 (reconsideration of ***State v. France***, 121 Wn.App. 394, 88 P.3d 1003 (2004)). This holding says nothing about proof minimally necessary to support conviction, other than a signed order is more than enough.

More relevant authority makes it clear enforcement of an order does not turn on whether a defendant elected to sign. Perpetrators of domestic violence cannot deprive victims the protection our Legislature intended by refusing to sign or by using disruptive behavior to ensure restraints render them unable to sign. As with any document intended to provide convenient proof of compliance with necessary procedures, compliance can be proved

by other means. *E.g.*, ***State v. Branch***, 129 Wn.2d 635, 642-643, 919 P.2d 1228 (1996)(absence of signature did not invalidate plea); ***State v. Rupe***, 101 Wn.2d 664, 678, 919 P.2d 1228 (1996)(failure to sign did not invalidate waiver); ***North Carolina v. Butler***, 441 U.S. 369, 373, 99 S.Ct. 1755 (1979).

Another problem with defendant's comparison of his case to ***France*** is factual. Unlike ***France***, proof of defendant's knowledge was not limited to the order. Proof he knew of the order exists in his schemes to violate it without detection.[9] *See* ***State v. DeVries***, 149 Wn.2d 842, 858, 72 P.3d 748 (2003); ***State v. Pettit***, 77 Wash. 67, 69, 137 P. 335 (1913); ***State v. Goodman***, 42 Wn.App. 331, 338, 711 P.2d 1057 (1985); ***Bryant***, 89 Wn.App. at 871; ***State v. Warfield***, 119 Wn.App. 871, 884, 80 P.3d 625 (2004). Those schemes ranged from talking to Spearance on the phone as if she was someone else while using her name in the third person to exploiting her name change from Curry to Spearance to deceive guards[10] into believing Spearance was not the protected party.[11] Ex. 1(a) (Apr. 13, 2015; 17:04 at

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[9] Less than two hours after the order, they discussed her inability to visit: "As long as I'm in here for this, you won't ever be able to come see me." Ex.1(a) (Apr. 13, 2015; 17:20 at 12:07-12:12). The conversation switched to her being talked about in the third-person: "If [Spearance] comes to see me, I'll get in trouble...." *Id* at 12:29-12:41. She responded: "we don't want that." *Id.* at 12:41-12:46.

[10] Two days after the order, defendant, quoting jail officials, said: "You can't contact her. You can't contact her no more. I was like Why? Hey, I need to know. They said Carol Curry. I said, It's not her, it's two different people."Ex.1(a) (Apr. 15, 2015;10:08 at 1:57-2:08). Earlier portions show Spearance was the only person being discussed. *Supra.*

[11] Just over an hour after the order, defendant said she could not visit him in jail with the pending charges. Spearance replied she could once she changed her ID; he responded "yeah." Ex. 1(a) (Apr. 13, 2015; 17:04 at 4:30-4:45); Ex. 42.

4:30-4:45), (Apr. 13, 2015; 17:20 at 12:01-12:46), (Apr. 15, 2015; 10:08 at 1:28-2:08); ***State v. Freebug***, 105 Wn.App. 492, 498, 20 P.3d 984 (2001) (guilty knowledge inferred from assumption of false name or concealment). Defendant's 9 convictions for violating the court's order should be affirmed.

3. DEFENDANT'S PREMATURE REQUEST TO PASS COSTS ALONG TO OUR TAXPAYERS SHOULD BE DENIED AS A COST BILL HAS NOT BEEN SUBMITTED AND THERE IS NO INJUSTICE IN A RECIDIVIST CONVICTED OF YET ANOTHER FIREARM ENHANCED DV ASSAULT REPAYING THE PUBLIC FOR HIS APPEAL.

a. Defendant's objection should await a bill.

Review of appellate costs should await an objection to a bill. RAP 14.4-14.5; ***State v. Sinclair***, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016); ***State v. Caver***, 195 Wn.App. 774, 784-86, 381 P.3d 191 (2016); ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000); ***State v. Blank***, 131 Wn.2d 230, 243-44, 930 P.2d 1213 (1997). Defendant should not be preemptively insulated from repaying the public for his appeal.

b. Money defendant receives would be well directed to repayment of costs.

RCW 10.73.160(1) authorizes the imposition of appellate costs. Imposition of costs has been historically considered an appropriate means

of ensuring able-bodied offenders "repay society for [] what it lost as a result of [their] crime." ***State v. Barklind***, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). This community-centric concept of restorative justice has been subordinated to an offender-centric concern for difficulties anticipated to attend repayment. ***State v. Blazina***, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). Ability to pay is not an indispensable concern. ***Sinclair***, 192 Wn.App. at 389.

Defendant revealed himself able enough to brutally assault one more person in a domestic relationship with him. Possessed with the prowess to overpower a former firefighter, and being "[e]xtremely intelligent" with "a good knowledge of the law," he appears to have strength and wit enough to redirect his energy from crime to gainful employment. Ordering him to repay the public for his appeal seems more just than shifting the burden to hardworking taxpayers, who rarely if ever avail themselves of the judicial resources recidivists like defendant too regularly consume.

F. ARGUMENT RE: RESPONDENT'S ASSIGNMENT OF ERROR.

THE NECESSITIES OF DEFENDANT'S CASE REQUIRE HIS FACIALLY INVALID SENTENCE TO BE REMANDED FOR CORRECTION PURSUANT TO RAP 2.4(a) BECAUSE EVERY COURT HAS THE DUTY AND POWER TO CORRECT ERRONEOUS SENTENCES UPON DISCOVERY AND DEFENDANT'S 120 MONTH SENTENCE VIOLATES RCW 9.94A.533(3) BY FAILING TO RUN HIS FIREARM ENHANCEMENT CONSECUTIVE TO HIS LONGEST CONCURRENT BASE OFFENSE SENTENCE.

1. REVIEW OF THIS ISSUE IS WARRANTED UNDER RAP 2.4(a) DESPITE THE LACK OF A CROSS APPEAL AS IT IS NECESSARY TO CORRECT FACIALLY INVALID SENTENCES WHENEVER THEY ARE DISCOVERED.

"Courts have the duty and power to correct an erroneous sentence upon its discovery." ***In re Pers. Restraint of Call***, 144 Wn.2d 315, 334, 28 P.3d 709, 719 (2001). This duty persists "even where the parties not only failed to object but agreed with the sentencing judge." *Id.* at Fn. 71(quoting ***State v. Loux***, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) *overruled on other grounds by* ***State v. Moen***, 129 Wn.2d 535, 545, 919 P.2d 69 (1996)). The mandatory nature of such corrections makes them necessities of a case, which are properly reviewed under RAP 4.2(a).

Defendant's sentence is facially invalid. The 72 month enhancement was not run consecutive to his longest concurrent base offense sentence as RCW 9.94A.533(3) requires. CP 153; ***State v. Thomas***, 150 Wn.2d 666,

669, 80 P.3d 168 (2003); ***State v. Mandanas***, 168 Wn.2d 84, 87-89, 228 P.3d 13 (2010). Reviewing courts cannot allow a sentence to stand where, as here, it exceeds the authority vested in the trial court by the Legislature. ***In re Pers. Restraint of Moore***, 116 Wn.2d 30, 38-39, 803 P.2d 300 (1991). Facial invalidities differ from erroneous exercise of sentencing discretion, which does require a notice of appeal for review. *E.g.* ***State v. Sims***, 171 Wn.2d 436, 444-45, 256 P.3d 285 (2011).

Correction of defendant's unlawful sentence is therefore a necessity of this case that should be reviewed under RAP 4.2(a) despite the absence of a cross-appeal. Correcting the facial invalidity now will likely conserve scarce judicial resources in the future. For one alternative is take the matter up in the trial court pursuant to CrR 7.8, which would foreseeably result in a second direct appeal. *E.g.*, ***State v. Priest***, 100 Wn.App. 551, 455-56, 997 P.2d 452 (2000); ***State v. Rowland***, 97 Wn.App. 301, 304-06, 983 P.2d 696 (1999). Another alternative would be for the Department of Corrections to petition this Court for the correction pursuant to RAP 16.18. In addition to portending further review that can be efficiently foreclosed here, postponing correction cannot be reconciled with the duty to correct sentencing errors like this upon discovery. ***Call***, 144 Wn.2d at 334. So the correction should be part of the mandate issued in response to this appeal.

2. THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT WITH INSTRUCTIONS TO RUN THE 72 MONTH FIREARM ENHANCEMENT CONSECUTIVE TO UNLAWFUL POSSESSION OF A FIREARM'S LONGEST CONCURRENT BASE SENTENCE TO BRING THE SENTENCE INTO COMPLIANCE WITH STATUTE.

Firearm enhancements are always to be consecutive to the longest concurrent base sentence. RCW 9.94A.533(3); ***Mandanas***, 168 Wn.2d at 87-89; ***Thomas***, 150 Wn.2d at 669.

To bring defendant's sentence into compliance with RCW 9.94A.533(3), the 72 month firearm enhancement attending his second degree assault conviction must be run consecutive to his longest concurrent base sentence (now 116 months) concurrently imposed for each UPOF 1 conviction. CP 149, 153. Pursuant to RCW 9.94A.533(3), his total confinement under sentence imposed should be 188 months (72 + 116 = 188). As it stands, the 72 month enhancement is running concurrently with the 116 month UPOF sentence, for it is subsumed in the 120 months imposed on the assault. Notes in the sentencing paperwork suggest the court structured the sentence to avoid exceeding the 120 month limit attending Class B felonies. RCW 9A.20.021(b). But that problem was avoided when the court reduced the assault's base sentence to 48 months (*i.e.*, 72 + 48 = 120). The facial invalidity in defendant's sentence occurred when the trial court further treated the total period of confinement for multiple Class B felonies as if capped by the maximum potential sentence for each. ***Thomas***,

150 Wn.2d at 671-72; ***Mandanas***, 168 Wn.2d at 87-89; RCW 9.94A.533(3). Remand for correction of sentence is required. ***Call***, 144 Wn.2d at 334.

G. CONCLUSION.

The trial court's correct ruling on the admissibility of Spearance's excited utterances should be upheld as they were made under the stress of being shot at amid flight from a brutal assault. Defendant's conviction for assault should be otherwise affirmed as it is well supported by admissible evidence. His convictions for violating the no-contact order should also be affirmed as the record contains sufficient proof of his pre-violation knowledge of the order. Appellate costs should not be reviewed or preemptively passed along to taxpayers. But defendant's case should be remanded for correction of sentence with directions to run the firearm enhancement consecutively to the longest of his concurrent base sentences as mandated by statute.

RESPECTFULLY SUBMITTED: January 18, 2017

MARK LINDQUIST
Pierce County
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WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/18/17 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

January 18, 2017 - 2:24 PM

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